Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

RONALD B. PAUL,

Petitioner,

vs.

FARMLAND INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals erred in determining that after-acquired evidence containing a post dated evaluation of petitioner (information previously unknown even to petitioner), and allowed by the trial judge to be discovered 1) over two months after the close of discovery, 2) over two years after the termination of petitioner, and 3) one week before the first trial setting, may be introduced into evidence at petitioner's age discrimination trial as a reason for termination of petitioner, when respondent did not raise this at any time for two years prior as a reason for termination of petitioner?

2. Whether after-acquired evidence should be introduced into evidence and read to the jury when it contains information regarding a settlement agreement previously entered into between petitioner and his former employer that had absolutely no bearing on the issue of respondent's age discrimination against petitioner?

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JURISDICTION

On May 19 and 20, 1993, after a nine day trial, the Honorable Dean Whipple in the United States District Court for the Western District of Missouri presiding, granted defendant's motion for directed verdict on plaintiff's pendent state law claims of Breach of Contract and Fraud and entered a judgment as a matter of law on the issues. Petitioner's claim of age discrimination was submitted to the jury. On May 20, 1993, the jury returned a verdict in favor of the respondent on the issue of age discrimination. On September 27, 1993, the petitioner's motion for a new trial was denied by Judge Whipple.

The petitioner, Ronald B. Paul, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on September 22, 1994. A Petition for Rehearing was denied by the court on October 26, 1994.

The order of the United States District Court for the Western District of Missouri, Western Division, 1993 WL 760161 is not officially reported. (Appendix 14). The decision of the United States Court of Appeals for the Eighth Circuit is reported at 37 F.3d 1274 (8th Cir. 1994). (Appendix 1). The decision of the United States Court of Appeals denying Petition for Rehearing and Petition for Rehearing En Banc, dated October 26, 1994, is not officially reported. (Appendix 22).

The statutory provision conferred judgment on this Court to review the judgment by writ of certiorari is 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Title 29, Section 623(a):

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Title 29, Section 623(f):

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age. . . .

(3) to discharge or otherwise discipline an individual for good cause.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff Ronald B. Paul's complaint alleged that his employer, Farmland Industries, Inc. (hereinafter "Farmland"), terminated his employment because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (hereinafter "ADEA"). Additionally, plaintiff's complaint alleged violations of Missouri State law with regard to Breach of Contract in connection with an employment contract between the plaintiff and defendant as well as Fraud in the inducement to enter into an employment expectancy for a minimum of three years. The case proceeded to trial which lasted for nine days, and prior to instructing the jury, the defendant requested a directed verdict with regard to all three issues. The United States District Court for the Western District of Missouri, the Honorable Dean Whipple, Jr., presiding, granted a directed verdict in favor of defendant Farmland on the Breach of Contract and Fraud claims. Only the claim of age discrimination was submitted to the jury for consideration. Judge Whipple[1] allowed

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[1] Judge Whipple has previously made comments with regard to his opinion on age discrimination cases. The comments were made during the trial of an ADEA case, but Judge Whipple mistakenly refers to the ADEA as Title VII. In *Phillip v. ANR Freight Systems, Inc.*, Judge Whipple stated in pertinent part:

> Just because lawsuits are filed doesn't give credibility to them, especially in these cases. Those are Title VII [actually ADEA] cases. Congress has created a nightmare because they entice anybody and everybody to file those things, and entice any attorney to file them in the mere chance that if they win a dollar they can

into evidence a 1) post-dated evaluation unknown to petitioner from his previous employer, and 2) a settlement agreement signed by petitioner and his previous employer and allowed the respondent's counsel to read to the jury directly from these documents during closing arguments over objections in the form of two motions in limine by petitioner's counsel.

The jury returned a verdict for Farmland on the claim of age discrimination. (Appendix 14). The petitioner filed a motion for a new trial, which was denied on September 27, 1993. Thereafter, the United States Court of Appeals for the Eighth Circuit affirmed, but with a separate dissent, the decision of the District Court and denied rehearing and rehearing en banc. (Appendix 22).

B. The Proceedings Below

The jury was informed at the beginning of the trial that they would be considering three separate issues, 1) age discrimination, 2) fraudulent misrepresentation, and 3) breach of contract. Following a nine day trial, respondent requested a directed verdict on all three issues, and a judgment as a matter of law was entered by the court on the issues of fraudulent misrepresentation and breach of contract. The issue of age discrimination was sent to the jury and after the jury's deliberation, a verdict in favor of the respondent was delivered. The petitioner

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> win attorney's fees. So I think any Title VII [actually ADEA] cases ought to be looked at with suspicion to begin with because its a crap shoot, which everybody engages in.

945 F.2d 1054, 1055 (8th Cir. 1991).

filed a motion for a new trial, which was denied on September 27, 1993.

The Eighth Circuit affirmed the decision of the District Court by a vote of two to one in favor of the respondent, ignoring 1) the issue of the after-acquired nature of the evidence allowed to the jury for consideration and 2) the evidentiary issue of allowing a prior settlement agreement into evidence.

C. The Nature of the Petitioner's Discrimination Claim

Petitioner was employed by respondent in 1987 as Vice President and Chief Information Officer (CIO) of Management Information Systems (MIS). Petitioner was approached by the respondent, through its President and Chief Executive Officer, James Rainey, for the position of Vice President and CIO of MIS. At the time petitioner was contacted by respondent's President and CEO, petitioner worked for Macy's in New Jersey having previously been employed by Macy's in Kansas City for several years prior to being promoted in MIS and transferred with Macy's to New Jersey. When petitioner originally interviewed with respondent, he was in Kansas City, Missouri for interviews with other potential employers (Payless Cashways) and was asked by respondent if he would also interview with respondent's President and CEO. Petitioner was not asked to fill out an employment application either before being offered a position with respondent, or after verbally accepting the position with respondent. Respondent had been informed of the qualifications of petitioner and his capabilities to forge respondent into the management information era by

respondent's consultants at IBM, with whom petitioner had previously worked years ago. Respondent made representations to petitioner regarding employment and paid for petitioner to return again at respondent's expense at which time respondent offered petitioner, at a minimum, employment for three years to "catch up" their MIS organization which was "ten years behind." Respondent's President and CEO induced petitioner to accept employment for at least three years with an offer of yearly bonuses and a three year cumulative bonus based on the performance of his business unit (MIS) and the company as a whole. Respondent rewarded petitioner for his performance and that of his business unit for two years of the three year period giving the petitioner maximum bonuses at the end of each of his first two years with respondent. However, before petitioner could complete the third and last year of the three year agreed-upon employment and receive the three year cumulative bonus, respondent terminated petitioner without notice and without cause. When respondent terminated petitioner after two years of employment, petitioner was fifty-two years old. Respondent replaced petitioner with an unqualified employee, who was thirty-six (36) years of age with no MIS experience or training, after petitioner had already set up and installed a new IBM computerized MIS system.

This litigation concerns events which occurred during the hiring process and the events leading up to petitioner's termination. The complaint alleged that respondent's officers had discriminated against petitioner based on his age as well as asserting claims of breach of contract and fraud in the inducement. The complaint

asserted that petitioner had been discriminated against based on his age (52), and was replaced by an individual who was younger (36) and less qualified than petitioner (no prior management or MIS experience) with regard to the claim of age discrimination. The petitioner had fulfilled two years of a three year contract with respondent, and had received the maximum bonuses two years running, under the terms of the employment contract. Petitioner was then terminated from his position with respondent before being allowed to complete the third year and before receipt of the final cumulative three year bonus under the contract which was paid to all other management executives (12) who were allowed to continue their employment through the third year of the three year bonus plan. Respondent replaced the petitioner with Mr. Dougherty who was thirty-six years of age, not experienced in MIS and not ever a supervisor of a business unit employing hundreds of employees.

Prior to terminating petitioner without notice, the President and CEO of respondent met with petitioner and offered him approximately $50,000.00 in additional wages if petitioner would sign a resignation and release of, *inter alia*, his age discrimination rights against respondent. Petitioner refused and was terminated against his will.

On the basis of the allegations of age discrimination, the complaint sought relief from the respondent in the form of 1) back pay, 2) compensatory damages, 3) front pay, and other equitable relief to redress the unlawful dismissal, and 4) liquidated damages for respondent's willful violation of the ADEA.

D. The After-Acquired Information

The after-acquired information in this case concerns information discovered 1) over two months after the close of discovery, 2) one week before the original trial setting, 3) and over two years after the termination of petitioner. One week before the original trial setting and over two months after the close of discovery, the respondent requested leave of court to depose the Record Custodian of Macy's of New Jersey (Macy's), petitioner's previous employer. Leave was granted by the court over strenuous objection by plaintiff's counsel because by this time, petitioner had clearly shown through discovery that respondent had a smorgasbord of inconsistent reasons given for termination of petitioner at various stages (i.e. reasons given by respondent at 1) time of termination, 2) answer to Missouri Service letter, 3) answer to lawsuit, 4) written interrogatory answers and 5) answers given in depositions.) The record's deposition was taken and petitioner's personnel file from Macy's was produced. Contained within the Macy's file were 1) outstanding performance evaluation and merit raises for numerous years until the last two years, as well as a confidential settlement agreement reached between petitioner and Macy's upon his resignation from Macy's, and 2) a poor performance evaluation which was completed by Macy's management after petitioner had left Macy's employment and which the petitioner had never seen. The settlement agreement contained within the personnel file provided severance to petitioner and petitioner agreed that he would not seek reemployment with Macy's.

The trial was rescheduled due to the reopening of discovery for the deposing of the Record Custodian, and petitioner filed a Motion in Limine to prevent the hearsay and irrelevant information contained within the personnel file from being introduced into evidence at the trial for any purpose, but especially for the purpose of providing a new after-acquired reason for the discharge of petitioner some three years later. Petitioner's motion in limine was denied by Judge Whipple, and the information was allowed to be introduced into evidence, including the hearsay testimony contained in the unsigned, but later dated evaluation, that petitioner had never seen. Also allowed into evidence by Judge Whipple were the details of the confidential settlement agreement between petitioner and Macy's. In fact, respondent's attorney read directly from the unsigned evaluation and settlement agreement during closing arguments all over the objections of petitioner's counsel in no less than two motions in limine.

The information contained within the personnel file from Macy's did not have any bearing on the actions taken by respondent in the hiring or the termination of petitioner. In fact, testimony revealed that respondent's management did not even know of any information in the Macy's personnel file prior to the termination of the petitioner nor had they asked or inquired of petitioner's performance at Macy's before they made the decision to offer a three year employment agreement to petitioner. The information contained within the file was not known to respondent prior to the time of the termination, and portions of the file were not even known to the petitioner prior to the deposing of the Record Custodian. The information contained within the file should not have

been introduced into evidence. No relevance for the information can be seen from the information that was introduced, since it was not relevant to the termination of petitioner, and the settlement agreement was entered into after the employment of petitioner by respondent had already begun. Thus, the information had absolutely no bearing on the issues before the jury for their consideration.

REASONS FOR GRANTING THE WRIT

A. THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN DETERMINING THAT AFTER-ACQUIRED EVIDENCE CONTAINING A POST DATED EVALUATION OF PETITIONER (INFORMATION PREVIOUSLY UNKNOWN EVEN TO PETITIONER), AND ALLOWED BY THE TRIAL JUDGE TO BE DISCOVERED 1) OVER TWO MONTHS AFTER THE CLOSE OF DISCOVERY, 2) OVER TWO YEARS AFTER THE TERMINATION OF PETITIONER, AND 3) ONE WEEK BEFORE THE FIRST TRIAL SETTING, MAY BE INTRODUCED INTO EVIDENCE AT PETITIONER'S AGE DISCRIMINATION TRIAL AS A REASON FOR TERMINATION OF PETITIONER, WHEN RESPONDENT DID NOT RAISE THIS AT ANY TIME FOR TWO YEARS PRIOR AS A REASON FOR TERMINATION OF PETITIONER.

The Eighth Circuit has issued two decisions with regard to the issue of after-acquired evidence; the decision in the lower case, *Paul v. Farmland Industries, Inc.* (Appendix 1), and the decision in *Welch v. Liberty Machine*

Works, Inc., 23 F.3d 1403 (8th Cir. 1994). These two decisions are in contradiction to the holdings of the Eleventh Circuit and the Fifth Circuit, and now this Court as of January 23, 1995, in its holding in *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993), *cert. granted*, ___ U.S. ___, 114 S.Ct. 2099 (1994).

The issue presented in this case is whether evidence may be introduced into evidence at trial that was not discovered until two years after the termination of the petitioner and had absolutely no bearing on the issue of age discrimination. The respondent has argued that this information should have been introduced into evidence at trial, as it would lead to an absolute bar against damages for the petitioner, under the Sixth Circuit per se rule, should discrimination have been found by the jury. The respondent is incorrect in this argument, in that there was absolutely no relevant reason for the introduction of the after-acquired documents into evidence at the trial, and the jury was unduly prejudiced by the introduction of these documents into evidence. Additionally, there was no prior showing by respondent that the after-acquired evidence was of such severity that petitioner in fact would have been terminated based on that evidence alone, if respondent had known of it at the time of petitioner's discharge.

There is currently a split between the circuits with regard to the issue of after-acquired evidence and its use in employment discrimination claims. The Eleventh Circuit has clearly stated the applicable rule and public policy reasoning behind the use of after-acquired evidence in *Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992). *See Eastland v. Tennessee Valley*

Authority, 704 F.2d 613 (11th Cir. 1983); *see also Lloyd v. Georgia Gulf Corp.,* 961 F.2d 1190 (5th Cir. 1992) *and Jimenez-Fuentes v. Torres Gaztambide,* 807 F.2d 230 (1st Cir. 1985).

The Eleventh Circuit has stated that after-acquired evidence should be considered only as a factor in the determination of the necessary remedy to be afforded to an employee who has been injured based on discrimination in employment. *Wallace,* at 1179-82. This would prevent the employee from being able to ask for equitable relief in the form of reinstatement as the employer would then have the right to automatically terminate the employee for the information discovered after the discriminatory action. *Id.*

The Supreme Court has ruled that a legitimate reason for adverse employment action may only be used if it was the reason that the employer had in mind "at the time of the decision." *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252 (1989). Additionally, as pointed out in the Petitioner's Brief to the Supreme Court in *McKennon v. Nashville Banner,* 9 F.3d 539 (6th Cir. 1993), *cert. granted,* ___ U.S. ___, 114 S.Ct. 2099 (1994), the National Labor Relations Act and other laws have been construed to not allow for the employer to claim freedom from liability by pointing out that it would have fired, or not have hired, the employee.

Obviously, the present case involves a situation where the highly prejudicial information was not discovered by the employer until two years after the termination of the employee. The respondent did not request this information from the petitioner before hiring him, and in fact did not even learn of this information until one week

before the initial trial setting. In fact, Mr. Rainey, respondent's CEO, when asked if he even checked out any of the information provided by petitioner before he offered him employment stated:

* * *

> Q. Okay. Would you please tell this jury what action you took as the chief executive officer of Farmland to investigate any of the information contained in that resume that you received from Mr. Paul?
>
> A. I didn't take any steps to investigate the information that was in the resume that I received from Ron Paul, in part because of the strong recommendation that I had received from the person at IBM and because I wanted to have the opportunity to visit with him before I would do anything more.
>
> (Transcript, pp. 1718-19)

* * *

> Q. Don't you also, Mr. Rainey, also check out the information provided you by that individual?
>
> A. Normally I have done that, and this was the only senior person that I ever hired that I did not ask for references where he had been employed so that I could follow up after the interview with references.
>
> Q. Right. And you had an opportunity after the August 31st interview until the September 19th interview, about 19 days, to check out any reference that you had with Mr. Paul after talking with him, correct?

A. Yes.

Q. Would you please tell this jury if you did so?

A. I did not.

(Transcript, pp. 1719-20)

It would be impossible for the respondent to fall under the requirements of *Price Waterhouse* for reasons held in the minds of the employer at the time of termination, in that this information was not even discovered until long after the discriminatory actions had already taken place.

The Sixth and Tenth Circuits have erroneously determined that the introduction of after-acquired evidence provides an absolute bar to recovery by the employee if the employer may show that the employee would have been fired, or in the current case not hired, on the basis of the after-acquired evidence. *Milligan-Jensen v. Michigan Technological University,* 975 F.2d 302 (6th Cir. 1992); *Dotson v. United States Postal Service,* 977 F.2d 976 (6th Cir. 1992); *Johnson v. Honeywell Information Systems, Inc.,* 955 F.2d 409 (6th Cir. 1992); *O'Driscoll v. Hercules, Inc.,* 12 F.3d 176 (10th Cir. 1994); *and Summers v. State Farm Mutual Automobile Insurance Co.,* 864 F.2d 700 (10th Cir. 1988). *See also Still v. Norfolk & Western Railway Co.,* 368 U.S. 35 (1961).

The Sixth Circuit has developed a line of reasoning which employs a per se rule for the courts to follow with regard to after-acquired evidence. This per se rule requires that the court, as a matter of law, deny all relief to the employee who has been discriminated against by his or her employer based on after-acquired evidence. *See Milligan-Jensen v. Michigan Technological University,* 975

F.2d 302 (6th Cir. 1992); *Dotson v. United States Postal Service*, 977 F.2d 976 (6th Cir. 1992); *Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d 409 (6th Cir. 1992). In fact, *Johnson* went so far as to find that the employee was entitled to no relief even if the violation of the law is proven with regard to discrimination.

The Eleventh Circuit, in the case of *Wallace v. Dunn Construction, Inc., supra,* has set out the problem with allowing the all inclusive acceptance of after-acquired evidence into the courtroom as prescribed by the per se rule. If employers are assured by the courts that the introduction of after-acquired evidence will be allowed wholesale in the courtroom and placed before the jury for their consideration, the desired effects of the anti-discrimination laws, including the ADEA, will be severely undermined or completely lost. The reasoning for the passage of the ADEA and similar anti-discrimination laws was to prevent discrimination from entering the workplace and hopefully eradicate it from those workplaces where discrimination was already present. If the introduction of after-acquired evidence is accepted by the courts into the courtroom and before juries, the attention of the employers will not need to be on the prevention of discrimination from entering the workplace, but on crafting employment documents that will lead to confusion and inherently create situations where employees will unknowingly provide false information on their employee records.

Additionally, employers will not be spending their time educating their employees to prevent discrimination, but instead will be spending their time preparing background investigations on their employees for future

use when their supervisors, due to lack of proper training, discriminate against their employees. This line of thinking can be seen by recent cases involving after-acquired evidence. *Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992). *Wallace* pointed out:

> The *Summers* rule does not encourage employers to eliminate discrimination. Rather, it invites employers to establish ludicrously low thresholds for "legitimate" termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and then manufacture a "legitimate" reason for the discharge that fits the flaws in the employee's background. . . . "[T]he law governing after-acquired evidence should not ignore the time lapse between the unlawful act and the discovery of the legitimate motive. . . .

Id. at 1180-81. *See O'Driscoll v. Hercules, Inc.*, 12 F.3d 176 (10th Cir. 1994) (after-acquired information that plaintiff had made inaccurate statements six years before the alleged act of discrimination in an application submitted, and ten years before employer even raised the issue); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993) (plaintiff would have been denied a promotion if the employer had known that over twenty years earlier the plaintiff had mislaid his weapon while employed as a police officer); *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515 (D. Kan. 1991) (details of the plaintiff's personal history, including the 12 different addresses plaintiff had since graduating from high school, moving twice to be with her husband when he changed jobs, and having been fired from a job at a drive-

in movie theater while in high school.) *See also*, G. Mersritz, *"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims*, 18 EMPLOYEE RELATIONS, L.J. 215 (1992) ("Employers . . . should maximize the probability that 'after-acquired' evidence is available as a defense by revising employment applications to elicit even more specific information" and "Management attorneys should respond to [*Johnson*] by routinely searching for pre-employment misrepresentations as a potential defense. . . . ")[2]

Obviously, these are clear examples of employers muckraking in the pasts of their employees rather than addressing the discriminatory issues properly before the court. Not only must the Sixth Circuit's per se rule be overruled, but the use of after-acquired evidence, especially in a jury trial, must either be severely limited or completely excluded from the fact finders consideration. This type of information can only be considered prejudicial to the jury. The proper use of this after-acquired evidence should be limited to post-trial motions for equitable relief.

Summers and *McKennon* both involved wrongdoing on the job. In contrast, the current case does not fix squarely into the categories or fact scenarios of either *Summers* or *McKennon*. Like *McKennon*, the present case

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[2] This article continues to give even further "advice" to management personnel on how to prepare for litigation by their employees with regard to information to request from discovery tools. This type of a "set-up" is exactly what will follow from the use of after-acquired evidence by employers.

does involve an age discrimination claim against an employer by an employee. However, the present case takes the after-acquired evidence issue one step further in that this case went to jury trial and the after-acquired evidence was introduced to the jury for their consideration without any limiting instructions on the use of the after-acquired evidence and its implications in the finding of age discrimination.

This is a situation where the respondent discriminated against petitioner by replacing him without notice or cause with a younger (36) unqualified (no MIS or management experience) individual, and then asking the petitioner to sign an age discrimination release in exchange for additional compensation. When petitioner refused, he was fired against his will by respondent. The petitioner filed suit against respondent for willful age discrimination, and one week before the first trial setting, the respondent discovered petitioner's file from his previous place of employment (Macy's of New Jersey) including a confidential settlement agreement and a later dated performance evaluation which had not even been known to the petitioner. The respondent had always known who the petitioner's previous employer was, and at no time before the reopening of discovery, which occurred one week before the first trial setting by Judge Whipple (a judge dissatisfied with employment laws passed by Congress, see footnote 1), did respondent attempt to look into the petitioner's personnel record from this previous employer. The respondent obviously did not believe that prior employment information was vital when offering the petitioner a three year employment agreement as CIO with the company, and it should

have been considered by the Court as not relevant to the issue of age discrimination and any reasons proffered by respondent for its termination of petitioner two years earlier, before respondent even learned of the information contained in Macy's of New Jersey personnel file on petitioner.

This is exactly the situation contemplated in *Wallace* by the Eleventh Circuit when refusing to follow *Summers*. Instead of remedying the discrimination and the effects of the discrimination, the respondent spent time searching through the employees' past records for whatever "dirt" it could find. No jury could help but be prejudiced against the petitioner by the introduction of this evidence at trial. *See also* LAWYERS WEEKLY USA, June 21, 1993, p. 1, col. 1. ("Some defense attorneys are now routinely 'digging up dirt' on plaintiffs and using it to obtain summary judgment.")

Therefore, the petitioner asks that the court accept certiorari in this matter or conditionally accept certiorari until the determination in *McKennon v. Nashville Banner* has been made, and then remand this case to the District Court for a new trial to proceed in accordance with the decision reached in *McKennon*.

B. AFTER-ACQUIRED EVIDENCE SHOULD NOT BE INTRODUCED INTO EVIDENCE AND READ TO THE JURY WHEN IT CONTAINS INFORMATION REGARDING A SETTLEMENT AGREEMENT PREVIOUSLY ENTERED INTO BETWEEN PETITIONER AND HIS FORMER EMPLOYER THAT HAD ABSOLUTELY NO BEARING ON THE ISSUE OF RESPONDENT'S AGE DISCRIMINATION AGAINST PETITIONER.

If the Court determines that after-acquired evidence must be taken into account when remedies are afforded to those who have been discriminated against, then and only then should after-acquired information become available for consideration by the finder of fact. As previously stated, this information should only come into play where the employee is seeking equitable relief in the form of reinstatement or similar circumstances. This information should not be displayed to the jury for wholesale consideration as to whether or not discrimination actually took place, particularly where a settlement agreement between petitioner and his former employer is involved. This is simply asking the jury to look at the information presented, and then make an after the fact determination as to whether or not the employee should have been terminated. Of course, the jury will be swayed by the argument that the employer would have never hired the employee had they known, as in *Churchman, supra,* where the employer stated that it would have never hired the employee if it had known of all the moves made by the employee before taking the position with the employer and being terminated from a position while still in high

school. This borders on ridiculous, and can make a mockery of the ADEA and similar discrimination laws.

The discrimination laws were designed to protect employees from being discriminated against based on their membership in a protected class. By allowing the introduction of after-acquired evidence into evidence for jury consideration on the basic issue of discrimination alleged or any legitimate defenses raised by employers, the underlying theory behind the ADEA, prevention of discrimination and relief from unlawful discrimination, is completely eroded. This case was not one of whether or not the employee made illegal photocopies while performing job related functions; this is a case where the employee entered into a settlement agreement with his previous employer after accepting employment with the respondent. This is a case where a performance evaluation was placed in the petitioner's personnel file after his resignation of employment with Macy's of New Jersey, his past employer. The existence of this performance evaluation was not even known to the petitioner until discovered by the respondent, one week prior to the original trial setting.

One problem with the current line of cases discussing the issue of after-acquired evidence is that the cases do not reach the question of whether or not this information, once discovered, should be entered into evidence, and considered by the fact finder. In *McKennon v. Nashville Banner, supra,* on which oral arguments were recently heard by this Court, the issue argued was in regard to a motion for summary judgment issued by the lower court, and sustained by the Court of Appeals. The current case takes the situation one step further.

In this case, there was no granting of the motion for directed verdict on the issue of age discrimination as requested by the respondent. Instead, this was a situation where the after-acquired evidence was discovered by the respondent immediately prior to trial, where the respondent's counsel read directly from the information, and informed the jury of the contents of a confidential settlement agreement between the petitioner and his previous employer. In *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161 (5th Cir. 1983), a similar disclosure of a settlement agreement resulted in a new trial being ordered.

The Federal Rules of Evidence, Rule 402, calls for the exclusion of all irrelevant evidence. Relevant evidence is defined by Rule 401, FED. R. EVID., as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, after-the-fact evidence is admissible only in cases involving misconduct or fraud on the part of the employee. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). There was no such fraud or misconduct in this instance, in that as previously stated, the petitioner did not even know of the existence of portions of the information contained in the personnel file until discovered by the respondent.

The Ninth Circuit has held that information not known to the decision-maker must be irrelevant in evaluating the employer's actions. *Norris v. City and County of San Francisco*, 900 F.2d 1326 (9th Cir. 1990). This is exactly the situation the petitioner finds himself in with regard to the admittance of the after-acquired evidence. The information must be considered irrelevant, and should not have been admitted into

evidence for the jury's consideration. There were no limiting instructions offered by the court for dealing with the use of the information presented by the respondent with regard to the settlement agreement and evaluation in the personnel file. The petitioner had filed two motions in limine prior to the trial to keep this information from the jury, but these motions were denied by the court. The petitioner did not "open the door" with regard to admittance of this information, and any further objection on the part of the petitioner's counsel at the time the information was presented would only serve to prejudice the petitioner further in front of the jury.

The District Court Judge, the Honorable Dean Whipple, was not willing to sustain the petitioner's further objections, and had previously ruled adversely on the motion to keep out the hearsay, irrelevant and prejudicial evidence. As noted earlier, Judge Whipple had stated on the record previously in another age discrimination case that age discrimination cases should be treated with suspicion, and therefore, irrelevant information, without any limiting instructions to the jury, was permitted to be introduced into evidence and presented to the jury for their consideration.

McKennon requires that after-acquired evidence should not be admitted without prior evidentiary showings by the defendant who seeks to use after-acquired evidence, and should only be used for consideration of equitable remedies. The present case goes one step further in that the issue in the present case involves the introduction of after-acquired evidence to the jury for consideration in determining whether or not discrimination actually took place.

The introduction of after-acquired evidence cannot overcome the existence of a discriminatory motive, due to the fact that the information is **after-acquired.** The Eleventh Circuit has correctly identified this problem, and has pointed out this problem while noting that the court "ignore[s] the time lapse between the unlawful act and the discovery of a legitimate motive." *Wallace v. Dunn Construction Co., Inc.* at 1181.

The Court currently is considering the arguments before it on *McKennon v. Nashville Banner* on the issue of the use of the Sixth Circuit per se rule on prohibition of damages in after-acquired evidence cases. It will be necessary to set a standard for the introduction of after-acquired evidence at trial if it is rightly determined that the per se rule of the Sixth Circuit should not be followed, and a more just approach, as in *Wallace v. Dunn,* should be applied. The prejudicial nature of this information should not generally be allowed into evidence and presented to a jury when the only relevance of the information is with regard to damages. If after-acquired evidence is presented to a jury at all, the only time should be after a verdict in favor of the party who was discriminated against, or with specific limiting instructions with regard to the use of the information. If this issue is not settled by the Supreme Court, the effects of the Court's decision in *McKennon* will be quickly and severely undermined by wholesale introduction of after-acquired evidence at the trial level. This case presents a perfect companion situation to *McKennon* and the issue of the use of after-acquired evidence.

Therefore, petitioner asks that the Court accept this case for certiorari on the basis that *McKennon* will not be able to fully answer the questions raised by the discovery of after-acquired evidence. *McKennon* was dismissed at the summary

judgment stage and did not progress to the point where the after-acquired information was used at trial. This case is perfect for the determination as to whether or not information, acquired after the discriminatory acts have occurred, should be admitted into evidence, and if so, at what point and with what instructions to the jury in this regard.

CONCLUSION

The Supreme Court should issue a writ of certiorari to review the judgment and opinion of the Eighth Circuit Court of Appeals and resolve these conflicts among the Circuits on these very important issues which frequently arise in, and are dispositive in, ADEA after-acquired evidence cases, and should remand this case to the District Court for a new trial in accordance with this Court's ruling in *McKennon*.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-3681

Ronald B. Paul, Appellant, v. Farmland Industries, Inc., Appellee.	* * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 9, 1994

Filed: September 16, 1994

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Ronald B. Paul appeals an adverse judgment in this action for age discrimination in employment, fraud and breach of contract. We affirm.

I. BACKGROUND

Paul was hired by Farmland in 1987 as Vice-President and Chief Information Officer and was terminated less than two years later. He filed this action alleging age

discrimination in employment under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, and breach of contract and fraud under Missouri law. At the close of the evidence, after a nine-day trial, the district court entered judgment as a matter of law in favor of Farmland on Paul's fraud and breach of contract claims. The age discrimination claim was submitted to the jury and the jury returned a verdict in favor of Farmland.

On appeal, Paul asserts that the district court erred in entering judgment as a matter of law on the fraud and breach of contract claims and erred with respect to the ADEA claim in receiving certain documents from Paul's personnel file from a former employer. He asserts that the improper evidence requires reversal of the jury verdict.

II. DISCUSSION

We review the district court's interpretation of state law de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). In reviewing the district court's grant of judgment as a matter of law, we apply the same standard as the district court. *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1263 (8th Cir. 1994). We consider the evidence and the reasonable inferences that may be drawn from the evidence in the light most favorable to Paul. *Id.*

A. Breach of Contract

We agree with the district court that Paul did not present a submissible breach of contract claim. Paul relies on several documents to create an ostensible contract of

employment for a term of three years.[1] These include a letter from the President of Farmland offering Paul the position and a long-term management incentive plan referenced in the letter. Nowhere in these documents do we find any expression, or even intimation, that either party contemplated employment for a term of years. The three-year management incentive plan merely outlines a component of Paul's compensation package. Under Missouri law, absent an employment contract to the contrary, an employee may be discharged for cause or without cause and the employee has no cause of action for wrongful discharge as a matter of law. *Johnson v. McDonnell Douglas, Corp.*, 745 S.W.2d 661, 662 (Mo. 1988) (en banc). Because Paul has presented no evidence of a contract for a term of years, the district court properly entered judgment on his breach of contract claim.

B. Fraud

Similarly, Paul did not prove a submissible case of fraud. Paul's fraud claim is premised on the contention

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[1] The dissent seems to be confused about one of the basic questions in this appeal. The issue is not whether Paul was terminated for "cause." The dispute is over "a guaranteed period of employment until July 31, 1990," a three-year term. Appellant's brief at 3. Nothing stated by Farmland executive Rainey with reference to the incentive plan, quoted by the dissent, advances Paul's theory of a three-year contract. Similarly, Paul's testimony on his purported interpretation of the incentive plan, also quoted by the dissent, proves nothing. Interpretation of unambiguous language in a document such as this is for the court, not the plaintiff. Also contrary to the implication of the last sentence of the dissent, there was a trial and the Judgment as a Matter of Law was entered after the court heard nine days of testimony.

that he was induced to leave another job and induced to work for Farmland by the false promise of Mr. James Rainey, Farmland's President, that Paul would have a contract of employment for three years. The district court found that an employee "may not assert a fraud claim that is essentially a cloaked contract claim." *Paul v. Farmland Indus., Inc.*, No. 90-0594-CV-W-1, Order at 7 (W.D. Mo. Sept. 27, 1993) (citing *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 883 (Mo. Ct. App. 1988)).

Under Missouri law, when a tort action arises from the breach of a contract, a plaintiff is precluded from maintaining both a breach of contract and a fraud claim against an employer. *Bernoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1318 (8th Cir. 1987). A fraud claim is permitted only if it arises from acts that are separate and distinct from the contract. *Id.* We need not resolve the issue of whether Paul presented a "cloaked" contract claim or a fraud claim based on separate and distinct acts, because we find, in any event, that Paul did not present a submissible case of fraud.[2]

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[2] Both sides cite *Bernoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1318 (8th Cir. 1987) in support of their opposing positions on the issue of whether Missouri law allows a "cloaked" contract claim and whether this case fits that mold. In *Bernoudy*, we held that fraud in the negotiation of an employment contract can amount to a separate cause of action for fraud under Missouri law. *Id.* at 1318. We are inclined to believe that the present case is more akin to *Deschler v. Brown & Williamson Tobacco Co.*, 797 F.2d 695, 697 (8th Cir. 1986), a case wherein we held the misrepresentations dealing with duration of employment were intimately related to an at-will employment contract thus barring suit for fraud. Here, the purported misrepresentations at the heart of the fraud claim are the same statements that

Under Missouri law,

> the elements of common-law fraud are: "(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, (9) and his consequent and proximate injury."

Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404, 1411 (8th Cir. 1987) (quoting *Heitman v. Brown Group, Inc.*, 638 S.W.2d 316, 319 (Mo. Ct. App. 1982)). Each of these elements must be established to make a submissible case of fraud, and failure to establish any one is fatal to recovery. *Id.*

The critical element in a fraud case based on a statement of present intent is proof that the speaker, at the time of the utterance, actually did not intend to perform consistently with his words. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1219 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986). Absent such an inconsistent intent there is no misrepresentation of fact or state of mind but only a breach of promise or failure to perform. *Id.* It is not enough that for any reason, good or bad, the speaker changes his mind and fails or refuses to carry his expressed intention into effect. *Id.* Whether the facts and circumstances justify a conclusion that a defendant knows a representation is false when made is ordinarily a

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form the basis of the alleged contract (as memorialized in the confirmatory letter).

question for the jury. *Jacobs*, 19 F.3d at 1263. Intent not to perform cannot be shown solely by nonperformance, it must be shown by other evidence. *Id.*

Here, Paul presented no facts or circumstances which, if believed, would allow a jury to find that Farmland knew its representations, if made, were false when made. Paul relies only on the testimony of Rainey to establish his fraud claim. Having carefully reviewed the testimony of Rainey in the light most favorable to Paul and giving Paul the benefit of all favorable inferences, we conclude that there is insufficient evidence for a reasonable jury to have found that Rainey's expressed desire to establish a long-term employment relationship with Paul was false when it was made. The evidence points to nothing more than a later "change of mind" by Rainey when Paul did not live up to the company's expectations as Chief Information Officer. Because Paul failed to produce any evidence that Rainey did not intend to perform consistently with his words, the district court properly dismissed the fraud claim. *See, e.g., Washburn*, 831 F.2d at 1412 (affirming entry of directed verdict on fraud claim for failure of proof under Missouri law).

C. Admission of Evidence

Paul further asserts that improper admission of his personnel file from a former employer requires reversal of the jury's age discrimination verdict. We give great deference to a district court's rulings on admissibility of evidence and will reverse only if the court has committed a clear abuse of discretion. *United States v. Jackson*, 914 F.2d 1050, 1053 (8th Cir. 1990). We find no abuse of

discretion here. Paul "opened the door" with respect to the personnel file by introducing evidence of his work record at his former employer. The evidence refuted Paul's contention that he could have continued working for his former employer.

Moreover, a jury's verdict will not be disturbed absent a showing that the evidence was so prejudicial as to require a new trial which would be likely to produce a different result. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990). Given Paul's weak age discrimination case – Paul was over fifty when he was hired; he was terminated at age fifty-two by the same people who hired him, all of whom were older than he was – it is unlikely that the result would have been different if the evidence had been excluded. There was ample evidence that Paul was terminated because of poor performance and inability to achieve goals within the cost constraints placed upon him. Under the circumstances, we are unable to find that the evidence, even if improper, was so prejudicial that its exclusion would change the outcome of the trial.

III. CONCLUSION

Accordingly, the judgment of the district court is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

There is ample evidence in this record from which a jury could find that Farmland's chief executive officer orally promised Paul that if he accepted employment with Farmland, he would not be terminated, except for cause, before August 31, 1990. There is also sufficient

evidence to show that in reliance on that promise, Paul gave up his job in New Jersey and moved himself and his family to take the Farmland job. This evidence, if believed by a jury, is sufficient to establish an enforceable contract between Farmland and Paul, a contract that a jury could find was breached by Farmland when it discharged Paul before August 31, 1990. It follows that I would reverse and remand to the district court for further proceedings consistent with this dissent.

I have no quarrel with the majority with respect to the provisions of the written contract, and would agree with them that were it not for the oral promise of employment for a definite period of time, *Johnson v. McDonnell* would control, and that under Missouri law, Paul could not recover on a contract theory. Here, however, a jury could find that Farmland made an oral promise to Paul that he would have a job for three years.

Paul called the chief executive officer, James L. Rainey, as an adverse witness. That officer testified as follows:

> Q: (By Mr. McClelland) So you did inform Mr. Paul that as part of his employment with Farmland, that he would be subject to being terminated, but only for cause, correct, sir?
>
> A: Yes.
>
> . . . .
>
> Q: Okay. And you agree, will you not, that he was, according to this plan, not subject to termination unless it was for cause; that's what you testified to earlier, correct?
>
> A: Yes.

Q: And you agree that the plan did cover the period through August 31, 1990, that he was under; is that correct?

A: Yes.

T. 1731, 1735. Later in the record, Rainey denied that he promised Paul a three-year job (T. 1739-43), but clearly a jury issue as to whether he had made an oral promise of three years of employment was raised. Paul himself testified as follows:

Q: (By Mr. McClelland) Okay. Would you please tell this jury after you received this document from Mr. Rainey and after he had explained it to you on September 19, 1987, what was the term of employment that he was employing for you?

A: Okay. He was employing me for the term beginning on October 12th 1987 through the end of this three-year plan, August 31, 1990.

. . . .

Q: Okay. So there were references to the three-year term going through 8-41-90 [8-31-90], not only on the first page, but also the second page of this plan, is that correct?

A: Yes, that's right.

Q: Is that consistent with what Mr. Rainey told you that you would be employed through 8-31-90?

A: Yes, it is.

. . . .

Q: Okay. Now Mr. Paul, why was it important to you that you be able to have an opportunity to spend three years at Farmland in

this new job of vice-president Management Information Services?

A: Well, it was important because, and I was changing locations, moving from New Jersey. It was important not just to have, in making this kind of change with the amount of work that Mr. Rainey has laid out, in that he had indicated that Farmland was ten years behind in our information systems, there was quite a bit of work to do to get Farmland caught up with the entire work program in MIS. And when Mr. Rainey offered me three years employment with the bonus plans, you know, I was very happy about it, I was very delighted with it.

I thought that, you know, there is an opportunity and an offer that, it's not just a typical offer, but it was a very exceptional offer, to get the annual bonuses that were there. And when he had lined out the three-year bonus plan and showed me the dates. And he had taken me through, you know, every one of these pages and he went through the specific criteria, he went through the results, pay-out examples. He was very concerned about me understanding clearly what the plan was, and he went through it in great detail.

And after he had offered this three-year employment plan, the one thing I asked him to do was to put our agreement in writing, so I was, you know, very pleased with the offer that he had made and everything else that he had, you know, offered with it.

Q: Mr. Paul, prior to this time, was it normal for you to get an offer of employment from

an employer that set forth a specified time period of three years, was that something normally that you had done before in the past?

A: No, I have not.

Q: Okay. But in this case, you were being asked to do something exceptional at Farmland; were you not?

A: Yes, I believe so.

Q: You were asked to catch up ten years of backlog in applications at Farmland, correct?

A: That's correct.

Q: Did you know at that time that it could not be done in one year?

A: Yes.

Q: Did you know at that time that it couldn't be done in two years?

A: It didn't appear to be a two-year project.

Q: And did you discuss that with Mr. Rainey, that you wanted to make sure that he gave you sufficient time to accomplish all of those objectives, and it would take at least three years to get those implemented?

A: I believe in our discussions that he may have indicated that, in our discussions one of us may have indicated that we would be looking at three or four years to try to get everything back on par.

Q: Okay. Did you rely on representations from Mr. Rainey that you would be employed for this three-year period, at a minimum?

A: Yes, I sure did.

Q: Did he make that representation to you?

A: Yes, he did.

Q: And didn't he even indicate to you that not only after this three-year period for annual and cumulative bonuses that follows this one, if the board approves it, correct?

A: Yes, he did. He also indicated to me that he was hoping that I was not looking at this as a one- or two-year position, that I was looking at accepting the position with Farmland Industries for the long-term; and I told him that I was.

And part of the plan here that he explained and the philosophies was to tie individuals to the company for the long term. And what he was trying to do was build a management team to help build Farmland's entire management and specifically information systems.

Id. at 155-56, 160, 160-63.

There remains only the question of whether the Missouri Statute of Frauds, which provides that contracts that cannot be performed within one year must be in writing, Mo. Rev. Stat. § 432.010, bars recovery in this case. In my view, it does not. If the party to whom the promise has been made fully performs his part of the bargain, he can enforce the contract. *See Performance of Personal Service as a Ground for Taking Oral Contracts Out of the Statute of Frauds,* 26 Wash. U.L.Q. 275 (1941); *Services as Part Performance to Take an Oral Contract Out of the Statute of Frauds,* 21 St. Louis L. Rev. 262 (1936). Here a

jury could certainly find that Paul had fully performed by giving up his old job, moving to a new community, taking up the new job with Farmland, and performing it satisfactorily.

In my view, Paul can also recover on a promissory estoppel theory. *See Bower v. AT&T Technologies, Inc.*, 852 F.2d 361 (8th Cir. 1988).

I would reverse and remand with directions to proceed to trial.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

RONALD B. PAUL, Plaintiff, v. FARMLAND INDUSTRIES, INC., Defendant.	)	No. 90-0594-CV-W-1 (Filed Sept. 27, 1993)

ORDER

Before the court is Plaintiff's Motion for a New Trial, along with Suggestions in Support, filed on June 3, 1993. Defendant filed Suggestions in Opposition on June 14, 1993. Plaintiff filed Reply Suggestions on June 25, 1993. After due consideration of the above, and for the reasons discussed below, Plaintiff's Motion is denied.

I. Background

At the close of all the evidence at trial, the court entered judgment as a matter of law in favor of Defendant on Plaintiff's Count II, Breach of Contract, and Count III, Fraud. The jury returned a verdict in favor of Defendant on Plaintiff's Count I, Age Discrimination. Plaintiff now seeks a new trial on each of these counts. Concerning Count I, Plaintiff contends that the jury's verdict was against the weight of the evidence,[1] and that

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[1] In order to be successful on this motion, Plaintiff must show that jury's verdict is contrary to the "clear weight of the

the court erroneously admitted the certain pieces of evidence.[2] Concerning Counts II and III, Plaintiff asserts sufficient evidence was introduced to require their submission to the jury.[3] Each will be discussed in turn.

II. Count I: Age Discrimination

A. Jury Verdict Contrary to the Weight of the Evidence

Plaintiff's first argument supporting his Motion for New Trial on Count I is that the jury's verdict for Defendant was against the weight of the evidence. However, the court rules that there is sufficient evidence in the record to support the jury's determination that Plaintiff's dismissal was not unlawfully based on Plaintiff's age, but rather on Plaintiff's unsatisfactory work performance. G.C. Matthiesen, James Rainey, Harold Cleberg, Stephen Dees, Tim Daugherty, William Dauphinais, and Susan Sundberg all testified as to their first-hand knowledge of

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evidence." *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972). Such a determination "is a matter committed to the sound discretion of the trial court." *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990).

[2] Where an evidentiary matter is asserted as grounds for a new trial, the "court must determine whether an evidentiary ruling was so prejudicial as to require a new trial which would be likely to produce a different result." *O'Dell*, 904 F.2d at 1200.

[3] The standard for granting a motion for judgment as a matter of law, pursuant to FED. R. CIV. P. 50(a), is "whether the evidence, when viewed in the light most favorable to the moving party, is such that reasonable people could only conclude that the movant should prevail." *Bournoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316, 1319 (8th Cir. 1987).

Plaintiff's performance deficiencies. Further evidence of the reasonableness of the jury's verdict is the fact that Plaintiff was hired at age fifty and dismissed less than two years later, with Mr. Rainey and Mr. Matthiesen participating in both decisions. *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992) (Eighth Circuit affirmed the grant of a directed verdict upon similar facts).

B. Defense Exhibit 36

Plaintiff claims error in the admission of Defense Exhibit 36, Plaintiff's personnel file from Macy's (his former employer), because it constituted "after-the-fact" evidence and, thus, was irrelevant.[4] The court does not agree.

According to FED. R. EVID. 402, "[a]ll relevant evidence is admissible, except as otherwise provided by . . . " the federal rules of evidence, the Constitution, statute, or Supreme Court rule. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

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[4] Plaintiff argues that the exhibit's irrelevancy and character as "after-the-fact" evidence are separate bases of error. However, the court does not agree, and will thus, treat the latter as a subset of the former. If a piece of evidence is relevant, it is admissible regardless of its character as "after-the-fact" evidence. Plaintiff does not direct the court's attention to any case law to the contrary.

The court determines that Defense Exhibit 36 was relevant for the following reasons: (1) evidence which tended to prove that Plaintiff misrepresented his qualifications at the time of his hiring was relevant to determine the amount of back pay to which Plaintiff was entitled; and (2) the performance evaluations were relevant to Plaintiff's credibility and truthfulness concerning various issues raised by Plaintiff on direct examination.

Plaintiff is correct when he asserts that "after-the-fact" evidence is not admissible to show a proper motive for dismissal. *See Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 369 (7th Cir. 1993). However, such evidence is admissible if it tends to prove the existence of any other material fact. *See Id.; Summers v. State Farm Mutual Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).

Plaintiff also asserts the court committed reversible error when it admitted Defense Exhibit 36 because Defendant failed to establish a proper foundation for its admissibility. The court determines that Defendant laid a proper foundation for admission of performance evaluations contained in said exhibit pursuant to the business records exception to the hearsay rule, FED. R. EVID. 803(6).[5] Plaintiff argues that the evaluations should have

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[5] Rule 803(6) provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted, by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testi-

been excluded because they lack "trustworthiness." First, Plaintiff testified that it was Macy's policy to have employees sign the evaluation and make comments, a procedure which was absent in this case. However, deposition testimony of the custodian of said business records indicates no such requirement. Second, Plaintiff makes much of the fact that 1987 evaluation was completed after Plaintiff left employment at Macy's. However, the court does not view this as improper in light of the settlement negotiations and agreement between Plaintiff and Macy's. Third, Plaintiff asserts the evaluations' lack of trustworthiness because they were based on opinion. This objection is devoid of merit on the basis of the plain language of the rule which expressly provides that the exception applies to "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, *opinions*, or diagnoses. . . . "

Finally, Plaintiff contends that the settlement agreement contained in the personnel file was inadmissible under FED. R. EVID. 408 which makes evidence of settlement inadmissible to prove liability. However, the court notes that the rule expressly allows courts to admit such evidence if introduced for other purposes. The court determines that such evidence was admissible in order to rebut Plaintiff's claim that he had a continued opportunity to remain at Macy's. This proposition was, in turn, relevant to the issue of backpay.

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mony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.

C. Defense Exhibits 24 & 25[6]

Plaintiff asserts that Defense Exhibits 24, a graph depicting the MIS budget from 1987-88 through 1991-92, and Defense Exhibit 25, a graph depicting a comparison of the MIS budget under Plaintiff and Tim Daugherty, were improperly admitted into evidence because they lacked both relevancy and reliability. The court rules that said exhibits were relevant to rebut Plaintiff's contention that he had out-performed Mr. Daugherty, his replacement. Furthermore, the court holds that Plaintiff's arguments concerning the exhibits unreliable nature[7] do not affect their admissibility, but go only to the weight they should be accorded.

III. Count II: Breach of Contract

The court's entry of judgment as a matter of law on Plaintiff's breach of contract claim was proper in that Plaintiff failed to establish the existence of a contract pursuant to which Plaintiff would be guaranteed employment for a period of three years. In the absence of such a showing, an employee may be "discharged for cause or without cause" and the employee "has no cause of action for wrongful discharge as a matter of law." *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. 1988) (en banc). In contrast, Plaintiff argues that the September

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[6] Plaintiff also objects to the court's admission of Defense Exhibits 24a and 25a, enlargements of Defense Exhibits 24 and 25, respectively.

[7] Plaintiff notes that the department was larger during Plaintiff's tenure, thus making budgetary comparisons unreliable. However, this point was fully explored at trial.

21, 1987 letter from Mr. Rainey to Plaintiff incorporated by reference a description of the management incentive plan which specifically stated the duration of the plan, and, hence, Plaintiff's employment for three years.

The *McDonnell Douglas* court held that an employer's unilateral act of publishing an employee handbook does not constitute a contractual offer to its employees. *Id.* at 662. The court reasoned that the "handbook was merely an informational statement of the [the employer's] self-imposed policies," and "[a]n employer's offer to modify the at-will status of his employees must be stated with greater definiteness and clarity than is found here." *Id.*

The management incentive plan in the case at bar is quite similar to the employee handbook in *McDonnell Douglas*. It merely informed top executives, including Plaintiff, at Defendant company of Defendant's self-imposed policy relating to incentive payment over the course of three years. Nothing in the policy would lead a reasonable employee in Plaintiff's position to believe that the parties had modified Plaintiff's at-will status.

IV. Count III: Fraud

The court's entry of judgment as a matter of law on Plaintiff's fraud claim was also proper. At least one Missouri appellate court has cited *McDonnell Douglas* for the proposition that an at-will employee may not employ the legal theory of fraud to assert a claim for wrongful discharge. *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 883 (Mo.App. 1988). In other words, a plaintiff may not assert a fraud claim that is essentially a cloaked contract claim.

This interpretation makes sense in that *McDonnell Douglas* re-affirms Missouri's strong allegiance to the employment at-will doctrine. In this case, the fraud claim arises out of the contract claim and to allow Plaintiff to assert a claim for fraud would subvert the state's expressed policy on this issue.

Plaintiff directs the court's attention to *Bournoudy v. Dura-Bond Concrete Restoration, Inc.*, 828 F.2d 1316 (8th Cir. 1987), in which the Eighth Circuit held that an at-will employee may assert a fraud claim against an employer when the latter's alleged misrepresentations took place during contract negotiations. However, the court makes two observations. First, the *Bournoudy* decision pre-dates the *McDonnell Douglas* case. Second, the court is bound by Missouri courts' interpretation of Missouri law on this claim.

V. Conclusion

Accordingly, it is ORDERED that Plaintiff's Motion for New Trial on Counts I, II, and III is

DENIED.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATES
DISTRICT JUDGE

DATED: SEP 27 1993.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3681WMKC

Ronald B. Paul, Appellant, vs. Farmland Industries, Inc., Appellee.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 26, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit